Filed 7/21/20 Maverick Distribution Services, LLC v. Eden Beauty Concepts, Inc. CA4/1

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

MAVERICK DISTRIBUTION SERVICES, LLC, Plaintiff and Appellant, v. EDEN BEAUTY CONCEPTS, INC., Defendant and Respondent.	D075180 (Super. Ct. No. 37-2015-00039572-CU-BC-NC)

APPEAL from a judgment of the Superior Court of San Diego County, Earl H. Maas III, Judge. Affirmed.

Sklar Kirsh and Ian Scott Landsberg for Plaintiff and Appellant.

Witham Mahoney & Abbott, Matthew M. Mahoney and Michael A. Leone for Defendant and Respondent.

Maverick Distribution Services, LLC doing business as Modern Salon Services, LLC is a wholesale distributor of beauty products. Eufora International, a division of Eden Beauty Concepts, Inc., manufacturers beauty products for professional salons. In May 2007, Eufora and Modern entered a distribution contract for Modern to exclusively sell and promote

Eufora products to customers within a defined sales territory. Central to this dispute is the "Term" provision stating that the contract "will remain in effect for 2 years and will automatically renew for 2 years at the end of each term to the then current distributor agreement."

After the contract automatically renewed in May 2009, May 2011, and May 2013, Eufora sought in spring 2015 to update the parties' agreement. Negotiations continued through August 2015, when a rift developed as to whether Texas would remain in Modern's exclusive distribution territory. Construing Modern's stance as an ultimatum—Texas or nothing—Eufora ended the parties' relationship. Modern promptly sued for breach of contract and breach of the implied covenant of good faith and fair dealing.

Following a bench trial, the court entered judgment entirely in favor of Eufora. Finding the "Term" provision in the 2007 contract ambiguous, the trial court relied on extrinsic evidence to conclude that the two-year term expired in May 2015. On appeal, Modern argues the court overlooked unambiguous language that the contract would "automatically renew" for two years at the end of each two-year term. Following this claimed automatic renewal in May 2015, Modern asserts that Eufora breached the renewed contract by unilaterally removing Texas from its distribution territory.

As we explain, the term provision in the 2007 contract is patently ambiguous. Did the parties contract for performance in perpetuity until breach? Or did the contract expire in May 2015 upon timely notice that Eufora wished to renegotiate? Because the only *admissible* extrinsic evidence is not in conflict, we are presented with a question of law. We conclude that the phrase "will automatically renew" simply describes how the parties would interpret *silence*—in the ordinary course, absent timely notice to the contrary, the distribution contract would automatically renew at the end of each two-year term for another two-year term. Nothing in the contract or in the extrinsic evidence supports Modern's stance that the parties intended to create a perpetual contract terminable only for breach. Because Eufora gave timely notice before the two-year term expired that it wished to renegotiate terms, the existing 2007 contract did not automatically renew in May 2015. The parties then continued without a contract in place, meaning there was no breach of contract in August 2015 when Eufora removed Texas from Modern's distribution territory. Because the implied covenant claim is merely superfluous of the contract claim, it was properly disregarded. For these reasons, the judgment is affirmed.

FACTUAL AND PROCEDURAL BACKGROUND

In May 2007, Eufora and Modern entered into a distributorship agreement. Modern was designated as the exclusive wholesale distributor of Eufora products in seven states: Missouri, Kansas, Arkansas, Oklahoma, Louisiana, Tennessee, and Kentucky. The contract required Modern to "sell and develop demand for Eufora products" in those territories, harnessing its "general knowledge of the professional salon industry and sales experience." The territories could not "be subsequently enlarged, reduced, or otherwise changed" without Eufora's written consent.

The parties agreed that Eufora's products could be sold only to professional salons, hairdresser schools, and similar establishments. Eufora set salon retail prices and gave Modern preferential wholesale pricing. Modern agreed to work with Eufora "to establish and meet purchase, sales, and market penetration goals" as would be mutually negotiated, and to send Eufora monthly sales reports.

Central to this case is the provision in the 2007 contract defining the agreement's duration. It appears under the heading, "Term." The parties agreed that the contract "will remain in effect for 2 years and will automatically renew for 2 years at the end of each term to the then current distributor agreement. (Unless terminated for breach of this agreement by either party is presented with 30 days written notice.)"

After execution, the contract renewed automatically on three occasions—May 10, 2009, May 10, 2011, and May 10, 2013. Each time, no renegotiation took place and no notices were sent; because no new distributor agreement had been signed, the renewals created new two-year terms pursuant to the same obligations defined in the 2007 contract. Modern's territories changed slightly over time by mutual consent. For a short period following a natural disaster in 2009, Modern voluntarily relinquished Louisiana to another distributor before retaking that territory. In January 2013, Modern agreed to become Eufora's exclusive distributor in Texas.

Sometime in 2013, Eufora began updating its agreements with all 15 of its distributors. Eufora's Vice President of Sales, Fred Phillips, contacted each distributor 30 to 60 days before expiration of that distributor's existing term to negotiate the new agreement. The aim was to get a new contract in place by the time the old one expired.

By mistake, Phillips reached out to Modern a year early. He wrote to Modern's President, Anthony Cox, that on May 10, 2014, Modern's contract with Eufora " 'will be in the renewal phase' " and that their current eight-year-old contract was "outdated." Phillips followed up with Cox in person to tell him he was off by a year. No one at Modern questioned what Phillips meant by the phrase, "renewal phase" during this time.

Phillips circled back the following year. In an e-mail dated March 24, 2015, he told Cox that Eufora was executing new contracts with all its distributors "as the old agreement is extremely outdated." Indicating that their current agreement expired on May 7, Phillips explained that Eufora "will be putting the new one in place at that time." Cox responded, stating he hoped to reach an agreement and would forward the proposed new contract to his lawyer. On May 9, Phillips followed up, reminding Cox: "I think the old contract terminates May 10, 2015." Cox replied on May 11 stating there were a few issues to work out, and his lawyer would be in touch.

Negotiations took another month to start. On June 3, Cox sent an e-mail to Beth Bewley, cofounder and CEO of Eufora, introducing her to his lawyer, Dave Halphin. Halphin followed up by sending Bewley comments on the proposed new agreement. More time passed. Hoping to convey urgency, Bewley e-mailed Halphin and Cox on June 13: "While I'm sure you are busy, Modern is currently working without an agreement and I'm sure Anthony [Cox] would like to get this completed sooner than later, as would Eufora." No one replied that Modern was not, in fact, working without an agreement.

On July 22, Halphin apologized to Bewley for the delay. He explained that Cox "wants to get this completed as soon as possible, and he has been in contact with me trying to push this along." Halphin requested a meeting and expressed optimism that he would finish his review within days. The following day, Halphin sent new revisions to Bewley. Bewley followed up with comments shortening Modern's proposed five-year term to two and suggested a meeting with Cox to finalize outstanding issues.

Around August 2015, Eufora received complaints from its salon customers and educators in Texas. Eufora had expressed concerns in 2014 about Modern's performance in Texas. Faced with these new complaints, Bewley and Phillips reviewed the sales data and discovered that Modern's sales in Texas were backsliding. Eufora believed change was necessary and that Modern was not aggressively focused on growing Eufora's brand in Texas.

On August 17, Bewley e-mailed Cox stating that while she and Halphin had resolved most items in the new agreement, other issues required a personal call. The parties arranged to speak on August 18. Participating on the call were Cox and Halphin for Modern, with Bewley and Phillips representing Eufora.

By all accounts, the call went poorly. Bewley raised concerns about Modern's performance in Texas, and Cox replied that sales in Texas were fine. When Bewley indicated that Eufora planned to withdraw Texas from Modern's distribution territory, Cox became volatile, angry, and emotional. He told her he was uninterested in continuing with other markets unless Texas was included. Bewley understood Cox to be issuing an ultimatum: Modern would either retain Texas or not distribute Eufora's products anywhere. Cox admitted being "pissed off"—the unilateral removal of Texas made him worry that Eufora would do the same for Modern's other territories. Cox did not think Eufora had the right to remove a territory from Modern without cause. Bewley suggested the parties take a day to cool off and reconvene.

Bewley recapped her understanding in an e-mail. Modern was unhappy with Eufora's intention to withdraw Texas, giving Eufora an ultimatum: "should Eufora pull back Texas then [Modern] [is] not interested in continuing with Eufora in any of [its] markets." Stating that result was not Eufora's desired outcome, Bewley suggested the parties discuss matters further.

Halphin responded that the August 18 phone call was the first time Bewley had suggested modifying Modern's distribution territory. Cox simply wanted “to move forward with all territory that he currently serves as previously agreed and that was assumed to be in the new agreement” because he had “spent considerable time, effort, and money to develop business in Texas.” In Modern’s view, if the new agreement withdrew any territories, then Eufora was effectively terminating the parties’ agreement with respect to all territories.

Two days later, Bewley e-mailed Halphin and Cox stating Eufora had decided to part ways with Modern. An attached letter stated, “Eufora will not be renewing a distribution agreement with Modern Salon Services,” and detailed procedures for inventory reform.

Two months later, Modern sued. For the first time, it alleged that the 2007 contract automatically renewed in May 2015. Modern claimed that by unilaterally removing Texas, Eufora breached the already-renewed 2007 contract and the implied covenant of good faith and fair dealing. The case proceeded to a bench trial, with the first phase limited to the question of liability. Cox and Halphin testified for Modern. Also testifying for Modern was Eufora’s former president, James DeBerry, who negotiated the 2007 distribution agreement for Eufora but later left the company on acrimonious terms. Bewley and Phillips testified for Eufora.

The parties broadly agreed on the timeline of events and stipulated to the authenticity and admissibility of e-mail exhibits. The fundamental disagreement centered on the construction of the “Term” provision in the 2007 distribution agreement. Cox testified as to his unexpressed subjective belief that the contract had automatically renewed on May 10, 2015. Halphin took Bewley’s comment that Modern was “ ‘currently working without an agreement’ ” to refer to the *new* agreement based on his unexpressed subjective belief that the old contract remained in place. In Cox’s view, absent termination for breach, Eufora had no ability to prevent the automatic renewal of the 2007 agreement. He noted that nothing was done to renew the contract in prior years.

Bewley offered a different view: the contract had an express two-year term. If both sides were happy with the arrangement, then the agreement would renew for another two-year term. But if there were sales concerns to address, they would be worked out in a new agreement at the end of the two-year term. Bewley always believed she had the ability to sever ties with a distributor at the end of a two-year term; she had done so with another distributor. The termination-for-breach language was inapplicable; it merely explained what was required to terminate a contract *during* a two-year term. Modern's contract was not terminated during a term, but rather was not renewed after the end of a term. Bewley explained that Eufora would not want to be tied to a perpetual contract, which would prevent both parties from addressing performance concerns in any given market.

The parties also disagreed on the effect of removing Texas from Modern's distribution territory. Cox conceded that only 10 percent of Modern's sales for Eufora occurred in Texas. But it generally took about two years of investment for a distributor to make inroads in a new territory and turn a profit; Modern was just getting going when Texas was pulled. Bewley agreed that Texas was a later add-on to the parties' agreement. But she believed Eufora had the right to reevaluate a distributor's territories during the contract renewal phase.

The court posed several questions for the parties to consider in preparing their posttrial briefs. In relation to the contract duration, the court inquired (1) whether the term provision in the 2007 agreement was ambiguous; (2) the enforceability of perpetual contracts under *Zee Medical*

Distributor Assn. Inc. v. Zee Medical, Inc. (2000) 80 Cal.App.4th 1 (*Zee*); and (3) the rationale for having a two-year term if the contract continued in perpetuity until breach. With respect to the removal of Texas in August 2015, the court asked whether the 2007 agreement had been amended to add Texas as a territory, and whether its removal amounted to a breach.

Following posttrial briefing, the court decided the contract interpretation issue in favor of Eufora. Finding the term provision in the 2007 contract ambiguous, it reviewed extrinsic evidence to conclude that the operable language was the two-year term. The court credited Bewley's testimony as "the most credible" in reaching this conclusion. Modern "was advised well in advance that the contract was being modified and that the 'term' was ending." That it "did not protest and actively engaged in discussion" showed it understood that the contract had a two-year duration. "It was only after learning that Texas would not be part of the territories, that Plaintiff first raised the argument that the contract automatically had already renewed. Plaintiff then took the position that if Texas was not included, Defendant was in breach, and Plaintiff could refuse to do any work, and receive all the profits it would have received (apparently for eternity). Plaintiff's witnesses were not credible in this regard."[1]

1 Assuming the 2007 contract had renewed, the court found that Eufora was not in breach by removing Texas. Texas was not included in the 2007 contract. Although Modern began distributing for Eufora in Texas at a later time, "there was no evidence presented that the contract itself was ever amended." And even if removing Texas could be considered a breach, that action "would not warrant the complete rejection of all further work by the Plaintiff in other territories which constituted 90 percent of the work previously being performed (and 100 percent of the written contract)."

DISCUSSION

Modern argues the trial court misconstrued unambiguous language in the 2007 distribution agreement that the contract would "automatically renew" for two years at the end of each two-year term. Starting from the premise that the contract automatically renewed in May 2015, Modern maintains Eufora's removal of Texas from its distribution territory amounted to a breach of contract. In addition, Modern faults the trial court for not addressing its claim for breach of the implied covenant of good faith and fair dealing.

As we explain, the trial court correctly found the term provision in the 2007 contract ambiguous. Because *admissible* extrinsic evidence bearing on its meaning is not in conflict, construction of this provision presents a question of law. On independent review, we conclude the most reasonable construction—indeed, the only reasonable construction—is that offered by Eufora and adopted by the trial court. The contract has a two-year duration, and absent timely notice to the contrary, automatically renews at its end for a new two-year term. Where (as here) notice was given before the two-year term expired, the contract did not automatically renew. Instead, the parties continued to operate without a contract as they attempted to negotiate a new distributorship agreement. When the parties parted ways, no new contract had been formed. Consequently, Eufora was not in breach when it unilaterally removed Texas. Because the implied covenant claim merely replicates Modern's contract claim, it was properly disregarded.

A. *The 2007 Contract's Term Provision is Ambiguous, and the Admissible Extrinsic Evidence Is Not in Conflict.*

"The basic goal of contract interpretation is to give effect to the parties' mutual intent at the time of contracting. (Civ. Code, § 1636; [citation].) When a contract is reduced to writing, the parties' intention is determined from the writing alone, if possible. (Civ. Code, § 1639.)" (*Founding Members of the Newport Beach Country Club v. Newport Beach Country Club, Inc.* (2003) 109 Cal.App.4th 944, 955 (*Founding Members*).)[2]

Where, as here, "the parties dispute the meaning of a contract term, the trial court's first step is to determine whether the term is ambiguous, i.e., [whether] it is 'reasonably susceptible' to either of the meanings urged by the parties. [Citation.] In making this determination, the court is not limited to the contract language itself but provisionally receives, without actually admitting, any extrinsic evidence offered by a party which is relevant to show the contract could or could not have a particular meaning. [Citation.] If, in light of the language of the contract and the extrinsic evidence as to its meaning, the trial court determines the language is 'reasonably susceptible' to either of the meanings urged by the parties the court moves on to the second step which is to determine just what the parties intended the contract term to mean." (*Curry v. Moody* (1995) 40 Cal.App.4th 1547, 1552 (*Curry*).)

"The trial court's ruling on the first step, the threshold question of ambiguity, is a question of law subject to our independent review." (*Curry*, *supra*, 40 Cal.App.4th at p. 1552.) "The trial court's ruling on the second step, the construction to be given to an ambiguous contract term, is a question of law subject to our independent review if no extrinsic evidence was introduced as to the meaning of the contract or, if extrinsic evidence was introduced, the evidence was not in conflict. We apply the substantial evidence test only when conflicting evidence was introduced as to the meaning of the contract term. In that instance, any reasonable construction of the contract will be upheld if it is supported by substantial evidence." (*Id.* at pp. 1552–1553; see *Medical Operations Management, Inc. v. National*

---

2 Further undesignated statutory references are to the Civil Code.

Health Laboratories, Inc. (1986) 176 Cal.App.3d 886, 891 (*Medical Operations*) ["it is only when the foundational extrinsic evidence is in conflict that the appellate court gives weight to anything other than its de novo interpretation of the parties' agreement"].)

Applying these standards, the trial court correctly found the term provision in the 2007 contract ambiguous. Modern construed the language as automatically renewing in perpetuity; nothing was done for the contract to automatically renew in 2009, 2011, and 2013. Construing the same operative provision, Eufora focused on the two-year term as signaling a beginning and end date, suggesting automatic renewal occurred only if both parties were content to continue on the same terms. By creating a two-year term that automatically renews at the end of that two-year period, the provision is reasonably susceptible to either of the meanings urged by the parties. (Compare *Zee*, *supra*, 80 Cal.App.4th 1, 10 [distributorship agreements unambiguously stated they " 'shall continue' " until grounds for termination arose].)

Moreover, this is not a situation where the *admissible* extrinsic evidence is in conflict. Both sides relied on the same e-mails between the parties. When asked why Modern did not respond to e-mails about the "renewal phase," contract expiration, and "working without an agreement," Cox merely testified that he silently believed the contract had already renewed in May 2015. Cox's undisclosed subjective intent is irrelevant to contract interpretation and therefore inadmissible. (*Founding Members*, *supra*, 109 Cal.App.4th at p. 956; *Berman v. Bromberg* (1997) 56 Cal.App.4th 936, 948; *G & W Warren's*, *Inc. v. Dabney* (2017) 11 Cal.App.5th 565, 577.) California recognizes the objective theory of contracts, under which the parties' objective intent, rather than the subjective intent of one of the parties, controls contract interpretation. (*Founding Members*, at p. 956.) Because "the competent extrinsic evidence is not in conflict," we independently construe the contract to determine the most reasonable interpretation of the parties' agreement in light of the undisputed evidence. (*Id.* at p. 955; *Millsap v. Spilman* (1969) 270 Cal.App.2d 444, 446; *Aozora Bank, Ltd. v. 1333 North California Boulevard* (2004) 119 Cal.App.4th 1291, 1295–1296.)[3]

B. *The 2007 Contract Had a Two-Year Duration, and Did Not Under All Circumstances Automatically Renew Upon its End in May 2015.*

We are tasked with construing the "Term" provision in the 2007 contract, which specifies both a two-year duration *and* automatic renewal at the end of each two-year term. If Modern is correct that the contract renewed automatically in May 2015, then we must consider whether Eufora's removal of Texas from its distribution territory amounted to a contractual breach. If Eufora is correct that the contract expired in May 2015, then no breach occurred because *no contract was in effect* when Texas was removed.

The "Term" provision reads as follows:

"**TERM**

> "This agreement supercedes [*sic*] all previous agreements and will remain in effect for 2 years and will automatically renew for 2 years at the end of each term to the then current distributor agreement. (Unless terminated for breach of this agreement by either party is presented with

---

3 Modern argues we should consider this evidence because it "went in without objection." We disagree. The trial court relaxed evidentiary rules to streamline proceedings in a bench trial, with the understanding that it would rely solely on competent evidence in rendering its judgment. Even if inadmissible evidence came in without objection, we therefore consider only *admissible* extrinsic evidence on independent review. Likewise, because our review is de novo, we need not consider the doctrine of implied findings.

> 30 days written notice.) If either party presents written notice the following conditions apply: [¶]
>
> "1.) Distributor is obligated to use its best effort to continue to promote Eufora products and serve existing accounts with executed Salon Agreements during the 30-day period after either Eufora or Distributor presents termination notice. Distributor shall adhere to this agreement and continue to represent Eufora with 'good faith' until the 30-day period ends. [¶]
>
> "2.) During the 30 day period after written notice of termination is presented, Distributor may purchase only what is necessary to service territory for this 30 day period of time. . . . [¶]
>
> "3.) Upon completion of the 30 day period, Eufora may choose to repurchase from Distributor all remaining marketable products at Distributor cost. . . . [¶]
>
> "4.) Eufora retains the right to terminate this agreement immediately for breach of this agreement or any diversion (the sale of any Eufora product to any customer not represented in the 'CUSTOMER' section of this agreement or the sale of any Eufora product to customers outside the distributors contracted territory). [¶]
>
> "5.) Any grievance resulting in legal action pursued by either the Distributor or Eufora in regards to any aspect of this agreement or other business conducted between Distributor and Eufora International will be required to be filed in the county of San Diego, State of California."

There are two possible ways to read the first paragraph. As Modern urges, one reading is that the contract requires perpetual performance until either party terminates for breach. For support, Modern cites *Zee*, *supra*, 80 Cal.App.4th 1, where a distributorship agreement stated it would continue until grounds for termination arose, and the appellate court construed the contract as having a valid express term of duration continuing until either party breached. (*Id.* at pp. 10–11.) But as Eufora points out, unlike the contracts in *Zee*, the 2007 contract contains an express two-year term, specifying a beginning and end date for performance. Accordingly, another way to read the contract would be to find that the automatic renewal language does not apply where, as here, either side gives timely notice before the end of the two-year term that it would like to renegotiate. As we explain, this is by far the most reasonable construction.

"[I]nterpretation of an ambiguous clause in a contract must be made in reference to the entire contract." (*Medical Operations*, *supra*, 176 Cal.App.3d at p. 893; see § 1641.) The purpose of the 2007 contract was to appoint Modern as Eufora's exclusive wholesale distributor within a defined territory for two years, from May 2007 to May 2009. When the contract automatically renewed in 2009, 2011, and 2013, the parties continued their relationship under the same terms. Modern was required to sell, promote, market, and develop demand for Eufora products among qualified salon customers. It was to "devote full time and attention to the sale of Eufora products *during the term* of this agreement," at all times using its best efforts "*during the term* of this agreement" to promote Eufora's products and "assign consistent sales coverage to the entire territory . . . ." (Italics added.) Modern would work with Eufora "to establish and meet purchase, sales, and market penetration goals as outlined in (exhibit C) and to provide all required monthly sales reports as requested by Eufora."

At trial, Cox claimed that "Eufora could never update its agreement" unless Modern consented to an update, even if it wanted to roll out new distributor agreements to all its distributors. Notwithstanding the contract's express beginning and end date, Cox claimed that Modern had the right to operate under the 2007 agreement forever unless there was a breach or unless the parties mutually agreed to a new contract. But this view is in tension with the rest of the agreement. In multiple instances, the 2007 contract emphasizes that Modern must increase sales of Eufora products within its territories *during the term* of the agreement and collate performance metrics. There would be little point to these obligations if, despite poor performance, the contract continued in perpetuity until breach. As Bewley explained, a perpetual contract would prevent both parties from addressing performance concerns in any given market. Mindful of the maxim that "courts should not construe ambiguous writings to create lifetime promises" (*M&G Polymers USA*, *LLC v. Tackett* (2015) 574 U.S. 427, 441), Modern's construction seems at odds with the mutual intent of the parties at the time of contracting. (§ 1636.)

Indeed, Modern's view would render the two-year duration language superfluous. When asked this question at trial, Cox replied, "[the contract] has to have a term. It has to be lined out." The term was needed "[s]o both parties understand the length of the agreement"—the beginning and the potential end. "It has a meaning. It's two years and then there's an anniversary date of two more years." But to adopt Modern's view, for a two-year term to signal a contract's *potential end*, it would have to coincide with termination for breach. This would render the two-year duration language both superfluous and capturing a happenstance event. In construing contract terms, we aim "to give effect to every part, if reasonably practicable, each clause helping to interpret the other." (§ 1641.) We decline to adopt a construction that renders the two-year term language meaningless.

Modern relies heavily on a poorly written parenthetical directly following the two-year term and automatic renewal language: "(Unless terminated for breach of this agreement by either party is presented within 30 days written notice.)" But this language must be construed with what follows. If the contract is terminated for breach, Modern must continue selling and promoting Eufora products for the 30-day notice period, after which Eufora may elect to repurchase remaining product held by Modern at cost. Unless terminated for breach in this manner, the contract "will remain in effect for 2 years and will automatically renew for 2 years at the end of each term to the then current distributor agreement." Put differently, the parenthetical only addresses the situation in which the contract is terminated *during* its two-year term, which requires 30-day notice and just cause. If so terminated, then the contract is neither automatically renewed nor in effect for the usual two-year term. The parenthetical does not impact the two-year duration of the contract *or* automatic renewal in the normal course. Nothing in it forecloses nonrenewal of the contract at the natural end of a two-year term.

Beyond the contract itself, extrinsic evidence supports our tentative conclusion. (See *Medical Operations*, *supra*, 176 Cal.App.3d at pp. 893–894.) Modern is correct that the 2007 contract automatically renewed in 2009, 2011, and 2013 without either party taking any affirmative steps to effectuate renewal. We also agree that nothing in the 2007 contract speaks to a renewal phase or renewal process at the end of each two-year term. But neither side *objected* to continuing the relationship on the same terms as applied in prior years. That Eufora did provide such notice here when the contract was up for automatic renewal in 2015 minimizes the significance of those earlier events.

On March 24, over a month before the two-year term ended, Phillips sent Cox a copy of Eufora's updated agreement, said Eufora was entering new agreements with all distributors, and described the old agreement as "extremely outdated." Hearing no response, Phillips contacted Cox again on May 9, reminding him that "the old contract terminates May 10th, 2015." Hoping to speed up the process, Bewley wrote on June 13 that "Modern is currently working without an agreement." At no point during these communications did anyone at Modern respond that the 2007 contract had automatically renewed. There was similarly no response the prior year when Phillips sent Cox a premature notice that Eufora planned to renegotiate during the "renewal phase." As Eufora puts it: "In the face of repeated communications from Eufora describing the [2007 contract] as entering a 'renewal phase,' after which it 'expired,' leaving Modern 'working without an agreement,' Modern's representatives did nothing to 'outwardly manifest' a contrary intent." The first time that Modern articulated the stance that the contract had automatically renewed on May 10, 2015 was in its *complaint*. Only after a problem emerged over Texas did Modern claim the removal of a territory would amount to effective termination of any existing contract. The parties' behavior between March 24 and August 17 readily supports the inference that neither side believed the contract had automatically renewed in May.[4]

---

4 Modern asserts that to rely on its silence would be to apply "the doctrine of estoppel for which there is no basis here." But Cox's silence is relevant not to show Eufora's detrimental reliance and entitlement to equitable relief. Instead, it is competent extrinsic evidence bearing on a question of law—how to construe the 2007 contract's term provision. "The conduct of the parties after execution of the contract and before any controversy has arisen as to its effect affords the most reliable evidence of the parties' intentions." (*Kennecott Corp. v. Union Oil Co.* (1987) 196 Cal.App.3d 1179, 1189.) " 'When the parties to a contract perform under it and demonstrate by their conduct that they knew what they were talking about

Drafts of the circulating new agreement are also instructive. Modern sent a redline draft on June 3 with the following proposed language under "Duration and Termination":

> "8.1. Term. This Agreement shall commence on June 1, 2015 and shall remain in effect until May 30, 2020. Either party may terminate this agreement by written notice 30 days prior to such termination date. Unless as otherwise terminated as provided herein, the Distributor's rights to Distribute Company's products in the Territory will renew for a period of Five (5) years under the then current Distribution Agreement or an Agreement that is mutually agreed to by Distributor and the Company. [¶]
>
> "8.2. Termination. This Agreement may be terminated immediately by written notice to the other party following the occurrence of any of the following events with respect to the other party (the 'Breaching Party') . . . ."

On July 23, Modern sent another redline with almost identical language, shifting the term commencement date to August 1. Bewley responded to these drafts on July 27. Her sticking point was Modern's suggestion of a five-year term: "As we discussed, Eufora is not offering 5 year contracts at this time. All contracts going forward are 2 years." There was no apparent pushback on either side to the allowance for termination by written notice 30 days prior to the end of the contract term. Had that provision reflected a change from the parties' existing understanding, one might have expected pushback *from Modern*. Undisputed trial evidence established that distributors generally preferred longer terms to recoup their up-front investments, while manufacturers preferred shorter terms. A perpetual

---

the courts should enforce that intent.' " (*Employers Reinsurance Co. v. Superior Court* (2008) 161 Cal.App.4th 906, 921.)

contract terminable only for breach likely provides a lengthier term than a five-year contract with an option to renew.

In short, independently construing the term provision in the 2007 contract, we agree with the trial court that the operative language was its two-year duration. The current term commenced on May 10, 2013 and ended on May 10, 2015. Absent timely notice to the contrary, the contract would have automatically renewed on that date just as it had three times before—the automatic renewal language defines how the parties would construe *silence*. But Eufora's notice on March 24, 2015 prevented automatic renewal. The parties behaved as though the contract terminated on May 10, after which they continued without an agreement while working to reach a new one. When a conflict arose over Texas, no new agreement had been signed. Consequently, when Eufora removed Texas from Modern's distribution territory, it was not in breach of the parties' contract because no contract was then in effect.[5]

C. *The Implied Covenant Claim Was Properly Disregarded as Superfluous*.

Modern also argues the trial court erred in failing to address its second cause of action for breach of the implied covenant of good faith and fair dealing. " 'Every contract imposes on each party a duty of good faith and fair dealing in each performance and in its enforcement.' " (*Careau & Co. v. Security Pacific Business Credit*, *Inc.* (1990) 222 Cal.App.3d 1371, 1393 (*Careau*).) This implied covenant exists "to prevent one contracting party from unfairly frustrating the other party's right to receive the *benefits of the*

---

5 Our conclusion that there was no contract in place obviates the need to consider whether Modern anticipatorily repudiated any contract when it refused to perform in the seven original territories upon Eufora's removal of Texas.

agreement actually made." (*Guz v. Bechtel National*, *Inc.* (2000) 24 Cal.4th 317, 349.)

The gravamen of Modern's claim was that, "contrary to the express provisions of the Distributor Agreement, [Eufora] terminated the Distributor Agreement after it had automatically renewed, and without cause." This is functionally identical to its claim that Eufora "breached the Distributor Agreement by terminating said agreement after it automatically renewed, without providing [Modern] with any explanation as to the reason for the termination." Where, as here, the implied covenant allegations "do not go beyond the statement of a mere contract breach and, relying on the same alleged acts, simply seek the same damages or other relief already claimed in a companion contract cause of action, they may be disregarded as superfluous as no additional claim is actually stated." (*Careau*, *supra*, 222 Cal.App.3d at p. 1395.)

Modern suggests it provided a different gravamen for the two claims *at trial*. Whereas the contract claim centered on Eufora's breach after the contract automatically renewed, the implied covenant claim centered on Eufora's actions in August 2015—removing Texas on a pretext of poor sales and ending the parties' relationship without evidence of breach. Assuming these theories differ, the pleadings, not the trial evidence, frame the issues to be decided. (See *Committee on Children's Television, Inc. v. General Foods Corp.* (1983) 35 Cal.3d 197, 211–212 [complaint in a civil action "serves to frame and limit the issues"]; *Simmons v. Ware* (2013) 213 Cal.App.4th 1035, 1048 [" 'The pleadings are supposed to define the issues to be tried.' "].) Modern did not allege that Eufora's bad faith removal of Texas unfairly frustrated its right to receive contractual benefits; it simply affixed a new label to its contract action. At no point did Modern seek leave to amend its pleadings to conform to proof. (See Code Civ. Proc, §§ 469, 473, subd. (a)(1), 576; *Garcia v. Roberts* (2009) 173 Cal.App.4th 900, 909−910.) There was thus no error in disregarding Modern's superfluous implied covenant claim.

DISPOSITION

The judgment is affirmed. Respondent is entitled its costs on appeal.

DATO, J.

WE CONCUR:

HALLER, Acting P. J.

AARON, J.